United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

74-2204

10/2/74

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

NO. _____

JOHN F. GANGEMI, et al.,

APPELLANTS

vs

SALVATORE SCLAFANI, etc., et al.,

APPELLEES

APPENDIX TO APPELLANTS' BRIEF

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200 West 57th Street
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Attorneys for Appellants

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PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

JOHN F. GANGEMI and JENNIE DI CARLO,

Plaintiff-Appellants,

vs.

CIV. NO. 74 C 1269

SALVATORE SCLAFANI, HERBERT J. FEUER, ALICE SACHS, ELIZABETH A. CASSIDY, CHARLES AVARELLO, ANTHONY SADOWSKI, STANLEY C. KOCHMAN, JOSEPH PREVITE, ELRICH A. EASTMAN, in their official capacities as Members of the New York City Board of Elections, and the NEW YORK CITY BOARD OF ELECTIONS, a governmental entity,

Defendant-Appellees,

and

ANGELO J. ARCULEO,

Intervenor-Appellee.

----------x

NOTICE OF APPEAL TO THE COURT OF APPEALS FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

NOTICE is hereby given that the plaintiff-appellants, above-named, hereby appeal to the United States Court of Appeals for the Second Circuit from the Judgment of the United States District Court for the Eastern District of New York, the Honorable Jack B. Weinstein presiding, which dismissed the complaint and denied plaintiff-appellants' motions for a temporary restraining order, preliminary injunction and permanent injunction.

The Judgment so described was handed down by the Honorable Jack B. Weinstein and filed with the Clerk of the United States District Court for the Eastern District of New York on the 4th day of September, 1974.

Respectfully submitted,

Thomas Hoffman
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1790 Broadway
New York, New York
(212) 245-2100

Attorneys for Plaintiff-Appellants

Dated: New York, New York
September 9, 1974

D.C. 106

74C 1260

DOCKET

WEINSTEIN

TITLE OF CASE

JOHN F. GANGEMI and JENNIE DI CARLO,

PLAINTIFFS

vs

SALVATORE SCLAFANI, HERBERT J. FEUER, ALICE SACHS, ELIZABETH A. CASSIDY, CHARLES AVARELLO, ANTHONY SADOWSKI, STANLEY C. KOCHMAN, JOSEPH PREVITE, ELRICH A. EASTMAN, in their official capacities as Members of the New York City Board of Elections, and the NEW YORK CITY BOARD OF ELECTIONS, a governmental entity,

DEFENDANTS

ATTORNEYS

For Plaintiff: Thomas Hoffman
200 West 57th Street
~~NY, NY 10019 581-1150~~
of counsel James I. M...
1790 Broadway
~~NY, NY 10019 245-2100~~

For Defendant:

BASIS

e judgment
s in removing
unconstitutional

JURY

ON

DATE	PLAINTIFF'S ACCOUNT	RECEIVED	DISBURSED
9-3-74	Complaint	15.00	
9-4-74	Fee to Treas		15 00
9-11-74	Notice of Appeal	5	
9-12-74	Paid to Treas		5

DATE	DEFENDANT'S ACCOUNT	RECEIVED	DISBURSED

ABSTRACT OF COSTS

TO WHOM DUE	AMOUNT

RECEIPTS, REMARKS, ETC.

3

74C 1269 GANGEMI, et ano vs. SCLAFANI, et al

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS	
9-2-74	Complaint filed.	1	JS5
9-2-74	Memorandum of law in support of T.R.O. filed.	2	
9/3/74	Before WEINSTEIN,J.- Case called- Application for a temporary restraining order is denied-Court retains jurisdiction pending disposition from pending proceedings-Submit order		
9-4-74	Before WINSTEIN, J.--Case called. Order to show cause for a TRO, etc. Hearing ordered, held & concluded. Motion denied and the complaint is dismissed without costs. Court's finding of fact & conclusions of law read into record. Court order to be filed.		
9-6-74	Memorandum of voting rights act of 1965 filed.	3	
9-6-74	Memorandum in support of Arculeo's motion to dismiss filed.	4	
9-6-74	Brief on behalf of petitioners' appellants filed.	5	
9-11-74	Pltffs' first amendment as of right (copy) filed.	6	
9-11-74	Stenographer's Transcript dtd 9-4-74 filed. Order of dismissal dictated into record (By WEINSTEIN, J. So ordered) The action is dismissed without costs. This oral opinion constitutes the Court's findings of fact and law. See Transcript dtd 9-4-74.	7	
9-11-74	Notice of appeal filed. Duplicate of notice and docket sheet mailed to C of A.	8	

FORM C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CIVIL APPEAL PRE-ARGUMENT STATEMENT

(To be filed by appellant with Clerk of Court of Appeals and served on other parties within ten days after filing notice of appeal.)

(Attach additional sheets if space is not sufficient)

APPEAL FROM DISTRICT COURT

DISTRICT ▷ EASTERN

DISTRICT COURT DOCKET NUMBER ▷ CIV. NO. 74 C 1269

DATE FILED IN DISTRICT COURT (MO. DAY YEAR) ▷ 9/3/74

DATE NOTICE OF APPEAL FILED ▷ 9/11/74

RELATED CASE(S) ▷

CASE TITLE (Complete)

John F. Gangemi and Jennie Di Carlo,
Plaintiff-Appellants

vs.

Salvatore Sclafani, Herbert J. Feuer, Alice Sachs, Elizabeth A. Cassidy, Charles Avarello, Anthony Sadowski, Stanley C. Kochman, Joseph Previte, Elrich A. Eastman, in their official capacities as Members of the New York City Board of Elections and the New York City Board of Elections, a governmental entity,

Defendant-Appellees

and

Angelo J. Arculeo,

Intervenor-Appellee.

Is this a cross appeal — YES ☐ NO ☒

Counsel
for appellants: Thomas Hoffman, 200 W. 57 St., New York, N.Y. 10019 (212) 581-1180
for appellees: J.A. Bonina, 16 Court Street, Brooklyn, N.Y. 11201 (212) JA2 1786
L.J. Lefkowitz, Attny. Gnl., 2 World Trade, N.Y., N.Y.
Corporation Counsel, Municipal Bldg., N.Y., N.Y. 10007

(Check One Box Only)

NATURE OF SUIT

CONTRACT
- ☐ INSURANCE
- ☐ MARINE
- ☐ MILLER ACT
- ☐ NEGOTIABLE INSTRUMENT
- ☐ RECOVERY OF OVERPAYMENT & ENFORCEMENT OF JUDGEMENT
- ☐ OTHER CONTRACT

REAL PROPERTY
- ☐ CONDEMNATION
- ☐ FORECLOSURE
- ☐ RENT LEASE & EJECTMENT
- ☐ TORTS TO LAND
- ☐ ALL OTHER REAL PROPERTY

TORTS — PERSONAL INJURY
- ☐ AIRPLANE
- ☐ ASSAULT, LIBEL & SLANDER
- ☐ FEDERAL EMPLOYER LIABILITY
- ☐ MARINE
- ☐ MOTOR VEHICLE
- ☐ OTHER PERSONAL INJURY

PERSONAL PROPERTY
- ☐ FRAUD
- ☐ OTHER PERSONAL PROPERTY DAMAGE

ACTIONS UNDER STATUTES

CIVIL RIGHTS
- ☒ VOTING
- ☐ JOBS
- ☐ ACCOMODATIONS
- ☐ WELFARE
- ☐ OTHER CIVIL RIGHTS

PRISONER PETITIONS
- ☐ VACATE SENTENCE (2255)
- ☐ PAROLE BRD. REVIEW
- ☐ HABEAS CORPUS
- ☐ MANDAMUS
- ☐ CIVIL RIGHTS

FORFEITURE/PENALTY
- ☐ AGRICULTURE
- ☐ FOOD & DRUG
- ☐ LIQUOR LAWS
- ☐ R.R. & TRUCK
- ☐ AIR LINE REGS.
- ☐ OTHER

LABOR
- ☐ FAIR LABOR STANDARDS
- ☐ LABOR/MGMT. RELATIONS
- ☐ LABOR/MGMT. REPORTING & DISCLOSURE ACT
- ☐ RAILWAY LABOR ACT
- ☐ OTHER LABOR LITIGATION

PROPERTY RIGHTS
- ☐ COPYRIGHT
- ☐ PATENT
- ☐ TRADEMARK

OTHER STATUTES
- ☐ STATE'S APPORTIONMENT
- ☐ ANTI-TRUST
- ☐ BANKRUPTCY TRUSTEE
- ☐ BANKS AND BANKING
- ☐ COMMERCE ICC RATES, ETC.
- ☐ DEPORTATION
- ☐ SELECTIVE SERVICE
- ☐ SECURITIES COMMODITIES EXCHANGE
- ☐ SOCIAL SECURITY
- ☐ TAX SUITS
- ☐ AGRICULTURAL ACTS
- ☐ ECONOMIC STABILIZATION ACT
- ☐ ENVIRONMENTAL MATTERS
- ☐ CONSTITUTIONALITY OF STATE STATUTES
- ☐ NARA, TITLE III
- ☐ OTHER STATUTORY ACTIONS

METHOD OF DISTRICT COURT DISPOSITION

Judgment before trial:
- Summary Judgment ☐
- Dismissal ☐
- Other ☐

Judgment during or after trial:
- Court trial ☐
- Jury trial ☐
- During trial ☐

Appeal from order:
- Preliminary injunction ☐
- Class action ☐
- Amend answer ☐
- Enforce settlement ☐
- Counsel fees ☐
- Stay ☐
- Other ☒

Prisoner petition:
- Granted ☐
- Denied ☐

Injunction:
- Granted ☐
- Denied ☒

Damages:
- Granted ☐
- Amount $ _____
- Denied ☐

Other relief (specify)

APPROXIMATE SIZE OF RECORD ▷ NUMBER OF EXHIBITS ▷ HAS TRANSCRIPT BEEN MADE? YES ☒ NO ☐

BRIEF DESCRIPTION OF NATURE OF CASE AND RESULT BELOW:

Injunction was sought to restrain Defendant-Appellees Board of Elections from removing Plaintiff-Appellants' names from the ballot for State Committeemen.

ISSUES PROPOSED TO BE RAISED ON APPEAL:

Whether court erred in asserting that Plaintiff -Appellants' constitutional rights under the First and Fourteenth Amendments to the United States Constitution and under the Voting Rights Act of 1971 (42 U.S.C. §1973) were not denied by the Court of Appeals' decision to remove Plaintiff-Appellants' names from the ballot.

I, Attorney for the Appellant, hereby certify that satisfactory arrangements have been made with the court reporter for payment of the cost of the transcript (FRAP 10 (b)). (Check one box)

I ☐(1) have already ordered the transcript to be prepared OR

☐(2) will order it to be prepared at the time required by the Staff Counsel in the implementation of the Civil Appeals Management Plan.

COUNSEL'S SIGNATURE _____ DATE 9/12/74

SECOND CIRCUIT

TRANSCRIPT INFORMATION
CIVIL APPEAL

To be completed by counsel for appellant in civil appeal to district court within ten days after filing notice of appeal.

DISPOSITION OF COPIES: (1) to Clerk of the Court of Appeals; (2) and (3) to Court Reporter; (4) Counsel for Appellee (5) retained by Counsel for Appellant.

THIS SECTION TO BE COMPLETED BY COUNSEL FOR APPELLANT

CASE TITLE	DISTRICT	DOCKET NUMBER
Gangemi, et al. Plaintiff-Appellants vs. Sclafani, et al., Defendant-Appellees.	Eastern	CIV NO. 74 C 1269
	JUDGE J. B. Weinstein	APPELLANT John F. Gangemi
	COURT REPORTER Henri LeGendre	COUNSEL FOR APPELLANT Thomas Hoffman

TRANSCRIPT ORDER
Must be completed

DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATES)

I am ordering a transcript.

I am not ordering a transcript.
Reason:

- ☐ Daily copy is available.
- ☒ Other. Attach explanation.

METHOD OF PAYMENT ☐ FUNDS ☐ CJA VOUCHER (CJA 21)

- ☐ PREPARE TRANSCRIPT OF PRE-TRIAL PROCEEDINGS
- ☐ PREPARE TRANSCRIPT OF TRIAL
- ☐ PREPARE TRANSCRIPT OF OTHER POST-TRIAL PROCEEDINGS
- ☐ PREPARE (Other: Specify)

DELIVER TRANSCRIPT TO: (NAME, ADDRESS, TELEPHONE)

I certify that I have made satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)). I understand that unless I have already ordered the transcript, I shall order its preparation at the time required by the Civil Appeals Management Plan, F.R.A.P. and the local rules.

COUNSEL'S SIGNATURE	DATE
	9/12/74

COURT REPORTER ACKNOWLEDGEMENT

To be completed by court reporter. Return one copy to clerk, U.S. Court of Appeals.

DATE ORDER RECEIVED	ESTIMATED COMPLETION DATE	ESTIMATED NUMBER OF PAGES

The transcript has not been ordered because no testimony was given and arguments were on the law only.

Thomas Hoffman
Attorney for Plaintiff-Appellants
200 West 57 Street
New York, N.Y. 10019
(212) 581-1180

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Exhibit "A"

----------x

In the Matter of :

GANGEMI vs. SCLAFANI : 74 C 1269

----------x

United States Courthouse
Brooklyn, New York

September 4, 1974

THE HONORABLE JACK B. WEINSTEIN, U.S.D.J.

HENRI LeGENDRE,

ACTING OFFICIAL COURT REPORTER

Plaintiffs seek a temporary restraining order and preliminary and permanent injunction to restrain defendants and their agents from removing the plaintiffs' name from the ballot in the election to be held on September 10, 1974, for Republican party office.

Plaintiffs contend that the action of the defendants in taking steps to remove their names from the ballot violates their rights as guaranteed to them under the Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States. They also contend that this action to be taken pursuant to the New York Court of Appeals decision in Lutfy v. Gangemi, --N.Y.--, --(1974) violates plaintiffs' rights under the Voting Rights Act of 1965. 42 U.S.C.§1973c.

The plaintiffs filed petitions sufficient in number under the New York Election Law to have their names placed on the ballot for the office of male and female members of the REpublican State Committee from the 49th Assembly District. Mr. Gangemi's name is listed as a candidate for county committeeman from 25 election districts; Mrs. DiCarlo is listed as a candidate in three

separate election districts.

The Board of Elections vacated these candidacies for all but one election district per person in accordance with prevailing New York law that one person may not run for public office for which he would be ineligible to serve because of a pending candidacy for an incompatible position. Matter of Burns v. Wiltse, 303 N.Y. 319 (1951). There is no incompatibility between the offices of State and County Committeeman but no person can be a committeeman for more than one district.

It has been established New York law that under such circumstances where it was illegal to run for more than one party office, the petitioner could stand as a candidate for one office if the other incompatible candidacies were eliminated by action of the Board of Elections. See Matter of Lutfy v. Gangemi, --N.Y. --, --(1974; Matter of Trongone v. O'Rourke, 68 Misc. 2d 6, affd., 37 A.D. 2d 763 (1971; Matter of Ryan v. Murray, 172 Misc. 105, affd., 257 App. Div. 1068 (1939).

The Board of Elections, pursuant to New York law, invalidated candidacies for all but one

election district per person -- i.e., each candidate was allowed to run for the office of State Committeeman and one County Committeeman. Pursuant to Section 330 (1) of the New York Election Law, the opponents of the plaintiffs in this case sought an order in the Supreme Court of the State of New York [illegible]ings County, prohibiting the Board of Elections from placing the names of respondents on the ballots at all. A full hearing was held by the Hon. Louis B. Heller, and experienced and knowledgeable Justice for the Supreme Court of the State of New York. At that hearing the main issue of fact was whether fraud so permeated the petitions that the plaintiffs should not be permitted to run even for one office. The colloquy between court and counsel clearly shows that fraud was the issue litigated:

> "THE COURT: ...they constitute a fraud on the whole petition, so that the whole petition must be voided for fraud, is that correct?
>
> "MR. BONINA: Well, on the part of the candidates.
>
> "THE COURT: Yes.

//

"MR. BONINA: And the subscribing witnesses.

"THE COURT: And the subscribing witnesses.

"MR. BONINA: And their running mates.

(page 6)

"THE COURT: To give me the evidence which you say would be sufficient to void the entire petition because of -- because of fraud; is that correct?

(page 7)

"THE COURT: I know, but primarily, you are attacking one man, Gangemi, for his conduct in permitting his name to be inserted in 25 election districts, aren't you?

"MR. BONINA: Correct, your Honor.

"THE COURT: Because if I come to the conclusion that he perpetrated a fraud by doing what he did, so the whole petition is down --

(page 12)

After hearing witnesses on this issue and after full stipulation of facts indicating that the plaintiffs did in fact know that they were being listed on separate petitions for separate county committee offices, the Court in an oral

opinion sustained the finding and action of the Board of Elections. The court specifically held:

> "...it is the opinion of this Court that the petition here involved is not so permeated with fraud, as a result of the various candidacies of County Committeemen and Women, as to warrant its invalidation." (page 53)

On appeal to the Appellate Division this decision was affirmed. Matter of Lutfy v. Gangemi, --,--(Appellate Division, Second Department (1974).

A dissenting opinion by two of the Appellate Division Justices made the point that the prior New York practice of permitting the candidate to run in one district should be changed. They noted, "we do not agree with its conclusion that the defendant should be prepared to run in one district of subsequent choice." On appeal to the New York Court of Appeals, in a per curiam opinion, that Court reversed. It specifically noted that it was overruling peior practice:

> "As a consequence, this court agrees with the dissenters at the Appellate Division in

this case that so much of the holdings in the Ryan and Trongone cases as permitted a single candidacy to survive are not to be followed."

The parties agree that neither the New York Court of Appeals nor any of the lower state courts considered the constitutional or federal statutory issues now raised in this court. This was confirmed by a call from the court to the Clerk of the New York Court of Appeals and by a telegram from that Clerk. Under the circumstances the remititur of the Court of Appeals could not be amended to show that a constitutional issue had been considered to facilitate an appeal to the United States Supreme Court. Under normal circumstances the plaintiffs in this case could move for reargument in the Court of Appeals requesting that the court reconsider in the light of the constitutional and federal statutory arguments now made. The Court of Appeals has, however, informed rhis court through its Clerk that the schedule of the court is such that it is not in a position to entertain such an application in time to consider it before the election on September 10th of this

year. In this court the parties were thus unable to accept the suggestion of this court that the matter be resolved by further adjudication in the state court with an ultimate appeal to the United States Supreme Court.

A B S T E N T I O N

There is strong reason to abstain in these election cases while state proceedings are completed. The New York Election Law is extremely complicated and the scheme is so interrelated that any change in a single part of the law may have widespread implications and create great difficulties in administration. Moreover, the New York State Courts have over the years developed procedures which permit extremely rapid disposition on the merits and appeals to the highest court of the state within hours or days. The expertise of the Board of Elections and the state courts in these matters is far greater than could be acquired by the federal court, which intervenes spasmodically. There are strong reasons under Texas v. Pullman Co., 312 U.S. 496, 61 S. Ct. 643, 85 L Ed. 971 (1941) and Burford v. Sun Oil Co.,

319 U.S. 315, 63 S. Ct. 1098, 97 L. Ed. 1424 (1943), as well as related cases, to defer to state decisions wherever possible. See C. A. Wright, Law of Federal Courts, §52 (2d ed. 1970).

In view, however, of the inability of the state courts to adjudicate these issues and the

(continued on next page)

desirability of giving the Supreme Court the benefit of at least one lower court hearing on the constitutional and federal statutory issues, abstention in this case is inappropriate. We note, too, that the specially protected activity of voting is involved here, so that the federal courts must be particularly sensitive to constitutional violations for which there is no effective remedy should abstention be utilized. See Dombrowski v. Pfister, 380 U.S. 479, 85 S. Ct. 1116, 14 L. Ed. 2d 22(1965); Zwickler v. Koota, 390 U.S. 611, 88 S. Ct. 1335, 20 L. Ed. 2d 182 (1967).

Exhaustion of available judicial remedies is not a prerequisite to a civil rights action under 42 U.S.C. § 1983. See, e.g., Eisen v. Eastman, 421 F. 2d 560 (2d Cir. 1969), cert. denied, 400 U.S. 841, 91 S. Ct. 87; James v. Board of Education, 461 F. 2d 566 (2d Cir. 1972), cert. denied, 409 U.S. 1042, 93 S. Ct. 529.

This court has, where necessary, intervened to protect constitutional rights of prospective candidates for office. See Yanoff v. Keeler, 74 C 1187 (E.D.N.Y., Aug. 22, 1974) (declaring the application of §330(1) of the New York Election Law

invalid as applied to the September 10, 1974 primary.

The state action is not binding on either res judicata or collateral estoppel grounds. See Thistlethwaite v. City of New York -- Fed. 2d -- (2nd Circuit, May 13, 1974).

Plaintiffs are not guilty of laches. They have prosecuted this action as speedily as possible.

We reluctantly, therefore, address ourselves to the merits.

PRESUMPTION OF FRAUD

It cannot be doubted that the Court of Appeals decision was based on a ruling of law and not a finding of fact that the plaintiffs had committed pervasive fraud in this instance. This is apparent from the tenor of the opinion. It is also apparent from the limited power that the New York Court of Appeals has to review findings of facts. See, e.g., N.Y.C.P.L.R. §§ 5612(a), 5613; Cohen & Karger, Powers of the New York Court of Appeals (rev. ed. 1952).

It is charged by plaintiffs that the Court of Appeals was either creating an irrebutable presumption that fraud in fact permeated the activities to the degree requiring total invalidation or it was changing the interpretation of the New York statute in a substantial way to make it impossible to provide that anyone who (in)advertently ran for inconsistent offices in the same election was disqualified from running for any of those offices in that election. If it was the former then there would be a vidation of due process. See, e.g., Cleveland Board of Education v. LaFleur, 414 U.S. 632, 644, 94 S. Ct. 791, 798, (1974) (declaring invalid a presumption that pregnant women were incapacitated

from teaching, "'permanent, irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments.'"); Vlandis v. Kline, 412 U.S. 441, 452, 93 S. Ct. 2230, 2236, (1973) irrebuttable presumption of non-residency of student invalidated); Stanley v. Illinois, 405 U.S. 645, 92 S Ct. 1208 (1972) (irrebuttable presumption preventing unwed father's custody of child violate of due process); Stewart v. Wohlgemuth, 355 F. Supp. 1212 (W.D.Pa. 1972) (irrebuttable presumption terminating welfare benefits of college students violative of due process); Owens v. Parham, 350 F. Supp. 598 (N.D. Ga. 1972) (irrebuttable presumption reducing shelter allowance on ground members of household bear pro rata share of expenses violative of due process; Boucher v. Minter, 349 F. Supp. 1240 (D. Mass. 1972) (irrebuttable presumption terminating shelter allowance where step-father lives in same house violate of due process.

But we do not find that an irrebuttable presumption of fraud was created here. There was a stipulation that plaintiffs deliberately used the device here. There was an implicit finding of fraud

even though not of pervasive fraud. These litigants had a full hearing in the trial court. No irrebuttable presumption was created. Future candidates are free to show lack of fraud, in fact.

If there is a substantial change in the law of New York then a serious question arises as to the ability of the state to change the law unilaterally. The Voting Rights Act of 1965 does apply to New York State. See Rosario v. Rockefeller, 93 S Ct. 1245 (1973).

Nevertheless, this act has previously been interpreted by the Court of Appeals for this Circuit as being designed primarily to prevent racial discrimination. See Powell v. Power, 436 F. 2d 94 (2d Cir. 1970). There is not the slightest hint of racial overtones in this case and it would be a futile exercise to require the extensive procedures of the 1965 Voting Rights Act to be followed. As the Court of Appeals noted in Powell v. Power, 436 Fed. at 87:

> "Since the plaintiffs expressly disavow the claim that they are the victims of any racial, or indeed any other purposeful and wrongful discrimination, the Act provides no remedy."

21

We note, in any event, that a three-judge court could not be provided given the five days' notice required. Sec. 42, U.S.C., 1973, 28 U.S.C., 2284(3).

We agree, of course, with able counsel for plaintiffs that the rights to vote and run in these party contests are critical to our democratic system and require the state to act with the greatest of sensitivity of abridging them.

It is well recognized that the substantive right to vote is the most fundamental of of constitutional rights. The United States Supreme Court has described it as the right "preservative of all rights." Yick Wo. v. Hopkins, 118 U.S. 356, 370 (1886). Accordingly, the right to vote is the assumption upon which the entire fabric of our political system is premised. Without the right to vote, freedom of speech and assembly would be relegated to meaningless anachronisms. It is not surprising, therefore, that the Federal Courts have explicitly recognized the right to vote as one of the "fundamental" rights, entitled to plenary protection against state encroachment.

As Chief Justice Warren, writing then for the United States Supreme Court in Reynolds v. Sims

377 U.S. 533, (1964) stated:

"Undoubtedly, the right to suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basis (c) civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."

It is further recognized that the right to participate in a primary election is as protected against state encroachment as is the right to vote in the general election. E.g., Bullock v. Carter, (405 U.S. 134) (1972), Nixon V. Herndon, 273 U.S. 536 (1927); United States v. Classic, 313 U.S. 299 (1941); Smith v. Adams, 345 U.S. 461 (1953). The federal courts have consistently observed that the right to vote may be rendered meaningless in the absence of a correlative right to participate in the partisan process by which candidates are selected. E.g., Socialist Workers Party v. Rockefeller, 314 F. Supp. 984 (S.D. N.Y.) aff'd 400 U.S. 806, 21 L Ed. 238 (1970).

(Continued on next page.)

In Williams v. Rhodes, 393 U.S. 23, 21 L. Ed. 2d 24 (1968), the United States Supreme Court explicitly held that the right to appear on the ballot is an integral element of the fundamental right to vote and must be measured by the same constitutional test that is applied to any substantial abridgement of the franchise.

The United States Supreme Court has imposed a rigorous standard in measuring the constitutionality of state action which restricts the franchise. Thus, in order to justify a classification or requirement which effectively denies access to the ballot, a state must demonstrate that the requirement involved advances a compelling state interest by the least drastic means. Dunn v. Blumstein, 405 U.S. 330 (1972).

In the instance before us, we have a striking proof that the means urged on us by the plaintiff are not workable. Despite the fact that for some third of a century the practice engaged in by plaintiffs has been denominated a fraud and a danger to free elections by the state, these plaintiffs persisted in it. We are not in a position to say

(Continued on next page.)

that the means chosen by the New York Court of Appeals to prevent a recurrence of such violations of New York's election laws were not sound under the circumstances. Compelling state interests justify the New York Court of Appeals action against plaintiffs in this case. The state has met its "heavy burden of justification." Dunn v. Blumstein, 405 U.S. 343.

Accordingly, the motions for a temporary restraining order, preliminary injunction and permanent injunction are denied. The action is dismissed without costs. This oral opinion constitutes the Court's findings of fact and law.

So ordered.

STATE OF NEW YORK, COUNTY OF RIGG ss.:

The undersigned, an attorney admitted to practice in the courts of New York State,

Check Applicable Box

☐ Certification By Attorney certifies that the within has been compared by the undersigned with the original and found to be a true and complete copy.

☐ Attorney's Affirmation shows: deponent is

the attorney(s) of record for in the within action; deponent has read the foregoing and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true. This verification is made by deponent and not by

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: September 9, 1974.

John Anthony Bonina

The name signed must be printed beneath

JOHN ANTHONY BONINA

STATE OF NEW YORK, COUNTY OF ss.:

Check Applicable Box

☐ Individual Verification the being duly sworn, deposes and says: deponent is the foregoing in the within action; deponent has read and knows the contents thereof; the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters deponent believes it to be true.

☐ Corporate Verification the of a corporation, in the within action; deponent has read the foregoing and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because is a corporation and deponent is an officer thereof.

The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows:

Sworn to before me on 19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF ss.:

is over 18 years of age and resides at being duly sworn, deposes and says: deponent is not a party to the action,

Check Applicable Box

☐ Affidavit of Service By Mail On 19 deponent served the within upon attorney(s) for in this action, at the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

☐ Affidavit of Personal Service On 19 at deponent served the within upon herein, by delivering a true copy thereof to h the person so served to be the person mentioned and described in said papers as the personally. Deponent knew the therein.

Sworn to before me on 19

The name signed must be printed beneath

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

CIVIL NO. _____

JOHN F. GANGEMI and JENNIE DI CARLO,

PLAINTIFFS

vs

SALVATORE SCLAFANI, HERBERT J. BEUER, ALICE SACHS, ELIZABETH A. CASSIDY, CHARLES AVARELLO, ANTHONY SADOWSKI, STANLEY C. KOCHMAN, JOSEPH PREVITE, ELRICH A. EASTMAN, in their official capacities as Members of the New York City Board of Elections, and the NEW YORK CITY BOARD OF ELECTIONS, a governmental entity,

DEFENDANTS

COMPLAINT

INTRODUCTION

1. This is a proceeding for a temporary restraining order and preliminary and permanent injunction to restrain Defendants and their agents from removing the Plaintiffs name from the ballot in the up-coming election to be held on Tuesday, September 10, 1974, and for a declaratory judgment declaring the action of the Defendant parties in removing the Plaintiffs' names from the ballot, unconstitutional in violation of the Plaintiffs' rights as guaranteed to them under the Due Process and Equal Protection Clauses of the 14th Amendment to the Constitution of the United States, and on the grounds that the New York Election Law, as interpreted by the New York Court of Appeals in Lutfy V. Gangemi, Abridges Plaintiffs right of access to the ballot without advancing a compelling state interest by the least drastic means and is in that regard

unconstitutional and the New York Election law, as interpreted by the Court of Appeals in Lutfy V. Gangemi establishes a conclusive presumption in violation of the due process clause of the Fourteenth Amendment.

JURISDICTION

2. The Court has jurisdiction over this action pursuant to 28 U.S.C. section 1343 (3) and (4) as hereinafter more fully appears, and 42 U.S.C. pps.1983. This is an action seeking redress for the deprivation of the Plaintiffs' contitutional and civil rights.

3. This is an action in equity, authorized by 42 U.S.C. Section 1983 (the Civil Rights Act of 1871) and 28 U.S.C. Sections 2201 and 2202. The rights to be securred are rights guaranteed by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

4. This is a proper case for determination by a three judge panel pursuant to 28 U.S.C. pps.2281 and 2284 in that Plaintiffs seek an injunction to restrain the Defendants from the enforcement, operation and execution of a decision of the New York State Court of Appeals which has state-wide application and which holds as a matter of law throughout the state, that any individual who knowingly files designating petitions for multiple incompatible candidacies is conclusively presumed to have acted in a manner intending to defraud the electorate, is therefore conclusively presumed to be unfit for public office, and is consequently denied access to the ballot. As such, this judically

created presumption, with state-wide total application, violates the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. A copy of said decision is attached hereto and made part hereof.

PARTIES

5. Plaintiff John F. Gangemi is an American citizen who resides in the Borough of Brooklyn, the City and State of New York and who represents a constituency as Republican Councilman-at-Large on the New York , City Council. He sought access to the ballot in order to achieve the elected party position of county committeeman and state committeeman within his chosen political party; and but for the action herein, taken as a consequence of the challenged judicially created presumption, he would have had the opportunity to be elected to the position he sought.

6. Plaintiff Jennie Di Carlo is an American citizen who resides in the Borough of Brooklyn, the City of New York. She sought access to the ballot in order to achieve the elected party position of county committeeman and state committeeman within her chosen political party; and but for the action herein, taken as a consequence of the challenged judicially created presumption, she would have had the opportunity to be elected to the position which she sought.

7. Defendants Salvatore Sclafani, Herbert J. Feuer, Alice Sachs, Elizabeth A. Cassidy, Charles Avarello, Anthony Sadowski, Stanley C. Kochman, Joseph Previte and Elrich A. Eastman are members of the New York City Board

of Elections; and in their capacities as the members of said Board they are responsible for conducting public elections throughout the City of New York, including the election to be held on Tuesday, September 10, 1974. In performing their function they have as a responsibility, among other things, for preparing the ballot and the appropriate voting machines utilized in conducting the election.

8. Defendant NEW YORK CITY BOARD OF ELECTIONS, is a governmental entity. Its function is to oversee and conduct the election process as it occurs throughout the City of New York. It will be performing its function, next, on Tuesday, September 10, 1974 and is presently in the process of preparing to do so.

ALLEGATIONS

9. The Plaintiffs herein sought the positions of county-committeeman in the Republican Party organization in the Borough of Brooklyn, New York City

10. In Addition, the Plaintiffs herein sought the positions of state-committeeman in the Republican Party organization in the Borough of Brooklyn, New York.

11. Such positions are elected positions.

12. In order to run in a election for the aforementioned positions it is necessary to obtain the signatures of a certain number of individuals on designating petitions.

13. The Plaintiffs did obtain the appropriate number of signatures on the designating petitions in order to qualify for the election for both county committeman and state committeman.

14. However, the Plaintiffs sought to run for multiple incompatible offices by seeking more than one county-committeeman seat.

15. The positions of county-committeeman and state-committeeman are not incompatible positions.

16. As a consequence of the incompatibility between the multi-county committeeman positions being sought, the Board of Elections of the City of New York foreclosed the Plaintiffs from running for all the county-committeeman positions which they were seeking, save for one specific seat.

17. The Plaintiffs multi-incompatible candidacies were challenged in the Supreme Court of the State of New York, Kings County.

18. The facts in that case were undisputed. The Plaintiffs acknowledged that they sought multi-incompatible candidacies for the position of county committeman within the Borough of Brooklyn, New York; and that the New York City Board of Election had foreclosed them from doing such save for one candidacy, striking their names in all others.

19. The Plaintiffs did not testify in the State Supreme Court action.

20. The Plaintiffs did not intend to defraud the electorate but merely sought to increase their chances of prevailing in the election for county committeeman. There is no explicit provision within the New York State Election Law which prohibits an individual from seeking more than one seat. The incompatibility provisions of the New York

State Election law are judicially

21. The New York State Supreme Court sanctioned the action of the New York City Board of Election in striking the Plaintiffs candidacies for county committeman from the ballot in all but one instance.

22. The Appellate Division, Second Department, upheld the Supreme Court's position, with two Justices thereof dissenting.

23. The Court of Appeals, as a unanimous court, reversed and struck the Plaintiffs entirely from the ballot foreclosing them from running for any county-committeeman's position in any election district and foreclosing them, as well, from running for the State committeeman's position which they were seeking and which is totally divorced and unrelated to the county committeeman's position.

24. As a consequence of the decision by the Court of Appeals, as described, the New York State Election Law now conclusively presumes that an individual, who knowingly files designating positions for multiple incompatible candidacies, is conclusively presumed, as a matter of law, to have acted in a manner intending to defraud the electorate; that such person is, therefore, presumed to be unfit for office and is consequently denied access to the ballot.

25. Such a presumption is inherently suspect and violates the rights of the Plaintiffs as guaranteed to them under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

26. Furthermore, the action in barring the Plaintiffs from running for the position of State Committeeman, which is not incompatible with the position of County-Committeeman and which had no relationship to the multiple incompatible candidacies for county committeeman is arbitrary and capricious, vindictive and punitive and bears no reasonable or necessary relationship whatsoever to effecting a legitimate and compelling state interest; and accordingly violates the rights of the Plaintiffs as guaranteed to them under the Fourteenth Amendment to the United States Constitution.

27. The Defendants are presently preparing the ballot machines for the election to be held on Tuesday, September 10, 1974, an election from which the Plaintiffs have been barred from seeking elective office therein.

28. It is believed that the Defendant Board is presently preparing the ballot for the designated voting machines to be placed in the various voting locations throughout the City of New York, including the Borough of Brooklyn; and that such ballot does not contain the names of the Plaintiffs.

29. It is believed that such machines, with the appropriate ballots thereon, will be placed in the voting locations on Tuesday, September 3, 1974; and that such machines will be kept thereat until the election on Tuesday, September 10, 1974.

30. Accordingly, the Plaintiffs have suffered irreparable harm as a consequence of the action taken against them in removing their names from the ballot; and will continue to suffer irreparable harm, particularly when the ballot is completed and the voting machines placed in the various voting locations.

31. The Plaintiffs have no adequate remedy at law and the Defendants will continue to cause Plaintiffs irreparable harm unless they are enjoined by this Court.

WHEREFORE, Plaintiffs respectfully pray that this Court:

1. Assume jurisdiction of this cause, convene a three-judge panel pursuant to 28 U.S.C. Sections 2281 and 2284 to determine this controversy, and set this case down for an immediate hearing on its merits.

2. Enter a temporary restraining order and a preliminary injunction pending the final determination of this cause by the three-judge panel, prohibiting the Defendants from removing the Plaintiffs' names from the ballot and requiring them to place the Plaintiffs' names on the ballot as they had initially sought to do before the New York State Court of Appeals mandated otherwise.

3. Enter a declaratory judment declaring the judicially created presumption of fraud (said presumption has state-wide application) in the New York State Election Law, where an individual knowingly files for multiple incompatible candidacies, to be unconstitutional in violation of the Plaintiffs rights as guaranteed under the Due Process Clause of the Fourteenth Amendment to the United States Constitu-

4. Enter a declaratory judgment declaring the removal of the Plaintiffs name from the ballot for all positions, whether they be included in the multiple incompatible positions or other positions totally unrelated to those incompatible positions, to be arbitrary, capricious, vindictive and punitive and without any reasonable or necessary relationship to a legitimate or compelling state interest; and, accordingly, to be unconstitutional in violation of the Plaintiffs rights as guaranteed to them under the Fourteenth Amendment to the United States Constitution.

5. Enter a final order reinstating the Plaintiffs to the ballot according to the direction of this Court.

6. Grant the Plaintiffs costs and attorneys' fees.

7. Grant the Plaintiff such other and further relief as this Court deems just and equitable; and retain jurisdiction over this matter to enforce all orders entered herein.

Respectfully submitted,

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STATE OF NEW YORK

COUNTY OF KINGS ss.

VERIFICATION

JOHN F. GANGEMI, being first duly sworn, deposes and says: that I am one of the Plaintiffs in the foregoing action; that I have read the foregoing Complaint and know the contents thereof, and the same is true of my own knowledge, except as to those matters and things stated therein upon information and belief, and as to those matters and things, I believe them to be true.

John F. Gangemi

JOHN F. GANGEMI

Sworn to and subscribed before me

this 2nd day of September, 1974.

Joseph P. Grancio Jr.

NOTARY PUBLIC

JOSEPH P. GRANCIO, JR.
Notary Public, State of New York
No. 24-6623970
Qualified in Kings County
Commission Expires March 30, 1976

My Commission Expires: _____

STATE OF NEW YORK)
ss:
COUNTY OF KINGS)

VERIFICATION

JENNIE DI CARLO, being first duly sworn, deposes and says:

That I am one of the Plaintiffs in the foregoing action; that I have read the foregoing Complaint and know the contents thereof, and the same is true of my own knowledge, except as to those matters and things stated therein upon information and belief, and as to those matters and things, I believe them to be true.

Jennie Di Carlo
JENNIE DI CARLO

Sworn to and subscribed before me
this 2 day of September 1974

Joseph P. Crancio Jr.
NOTARY PUBLIC

JOSEPH P. CRANCIO, JR.
Notary Public, State of New York
No. 24 66 3970
Qualified in Kings County
Commission Expires March 30, 19 76

My commission expires:

35a

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

CIVIL NO. _____

----------x

JOHN F. GANGEMI and JENNIE DI CARLO,

Plaintiffs

vs.

SALVATORE SCLAFANI, HERBERT J. PEUER, ALICE SACHS, ELIZABETH A. CASSIDY, CHARLES AVARELLO, ANTHONY SADOWSKI, STANLEY C. KOCHMAN, JOSEPH PREVITE, ELRICH A. EASTMAN, in their official capacities as Members of the New York City Board of Elections, and the NEW YORK CITY BOARD OF ELECTIONS, a governmental entity,

Defendants.

----------x

ORDER TO SHOW CAUSE

UPON the Plaintiffs' Verified Complaint, Motion for the Convening of a three-judge panel and a Temporary Restraining Order and Preliminary Injunction pending the outcome of the cause, the Affidavit of Joseph P. Grancio, one of the attorneys for the Plaintiffs, and a Memorandum of Law in Support of the aforementioned Motion,

IT IS HEREBY ORDERED that the Defendant parties or their Attorneys appear at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the day of September, 1974, at o'clock in the noon, in Room no. , and SHOW CAUSE why an order should not be entered convening a three-judge panel, as provided for by 28 U.S.C. §2281 and 2284, to consider the merits of the Plaintiffs' constitutional challenge to the conclusive presumption of law judicially mandated in the New York State Election Law which has state-wide applicability where multiple incompatible candidacies are pursued by an individual, and why a Temporary Restraining

Order and Preliminary Injunction should not be issued, pending the final determination of this cause by the three-judge panel, prohibiting the Defendants from removing the Plaintiffs' names from the ballot and requiring them to place the Plaintiffs' names on the ballot as they had initially sought to do before the New York State Court of Appeals mandated otherwise.

IT IS FURTHER ORDERED that personal service of a copy of this Order and the papers upon which the said Order is based, be made upon the Defendant parties or their attorneys on or before the day of September, 1974 at and shall be sufficient service of this order.

DATED:

UNITED STATES DISTRICT COURT JUDGE

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

CIVIL NO. _____

----------x

JOHN F. GANGEMI and JENNIE DI CARLO,

Plaintiffs,

vs.

SALVATORE SCLAFANI, HERBERT J. FEUER, ALICE SACHS, ELIZABETH A. CASSIDY, CHARLES AVARELLO, ANTHONY SADOWSKI, STANLEY C. KOCHMAN, JOSEPH PREVITE, ELRICH A. EASTMAN, in their official capacities as Members of the New York City Board of Elections, and the NEW YORK CITY BOARD OF ELECTIONS, a governmental entity,

Defendants

----------x

MOTION FOR THREE-JUDGE PANEL
TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

Plaintiffs JOHN F. GANGEMI and JENNIE DI CARLO move the Court to grant the following relief:

1. An order convening a three-judge panel as provided by 28 U.S.C. pps.2281 and 2284 in order to declare the judicially created conclusive presumption of fraud in the New York State Election Law (with state-wide application) where an individual files multi-incompatible candidacies, as unconstitutional and violative of the Plaintiffs' right as guaranteed under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

2. Enter a temporary restraining order and preliminary injunction pending the final determination of this cause by the three judge panel, prohibiting the Defendants from

removing the Plaintiffs' names from the ballot and requiring them to place the Plaintiffs' names on the ballot as they had initially sought to do before the New York State Court of Appeals mandated otherwise.

Plaintiffs seek this relief on the grounds that:

1. Plaintiffs GANGEMI and DI CARLO have no adequate remedy at law and the Defendants will continue to cause Plaintiffs irreparable harm, unless enjoined by this Court.

2. In that regard, Plaintiffs are seeking elective office. The Election is to be held on Tuesday, September 10, 1974. The Defendants are preparing the ballot and the voting machines for the election and it is believed that they expect to have the same completed by Tuesday, September 3, 1974. The Plaintiffs names will not be on the ballot, as a consequence of the challenged policy and action herein, unless this Court so orders. The Plaintiffs will be irreparably harmed should they prevail on the ultimate merits of the case and there is no time to place their names on the ballot; on the other hand if they do not prevail, there will still be sufficient time to delete their names from the ballot. It is believed that the latter is an easier process than the former (deleting rather than adding).

3. Plaintiffs seek to obtain a declaratory judgment and injunctive relief respecting a judicially mandated conclusive presumption of fraud in the New York State Election Law (with state-wide application) where an individual files multiple, incompatible candidacies. They seek this relief on the grounds that said presumption violates the plaintiffs' rights as guaranteed to them under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and on the further grounds that the denial of Plaintiffs'

right of access to the ballot without advancing a compelling state interest by the least drastic means is unconstitutional. The issue is substantial and, though difficult, hardly frivolous. Accordingly, 28 U.S.C. Sections 2281 and 2284 require the convening of a three-judge panel to determine the issue.

Respectfully submitted,

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STATE OF NEW YORK)
ss:
COUNTY OF KINGS)

AFFIDAVIT OF JOSEPH P. GRANCIO

JOSEPH P. GRANCIO, being first duly sworn, deposes and says:

The Plaintiffs JOHN F. GANGEMI and JENNIE DI CARLO are proceeding by an Order to Show Cause rather than by Notice of Motion because time is of extreme importance in this matter. In support of this application, as more fully set out in the verified complaint, the Motion for a three-judge court and a temporary restraining order and preliminary injunction, and the Memorandum in support thereof, Plaintiff will show that the New York Election Law, as interpreted by the New York Court of Appeals in Lutfy v. Gangemi, abridges Plaintiffs right of access to the ballot without advancing a compelling state interest by the least drastic means and is in that regard unconstitutional, and the New York Election Law, as interpreted by the Court of Appeals in Lutfy v. Gangemi establishes a conclusive presumption in violation of the due process clause of the Fourteenth Amendment.

Plaintiffs will show that they have suffered irreparable harm as a consequence of the aforestated action and that they continue to suffer the same each passing day.

Plaintiffs will show that they have not sought relief, in this regard, from this Court heretofore, Plaintiffs will show that the law under attack has state-wide applicability and that, accordingly, a three-judge court is proper and appropriate to hear the merits of the constitutional challenge.

Plaintiffs will show that they have "...raised questions going to the merits (of their claims) so serious, substantial and difficult...as to make them a fair ground of litigation and thus for a more deliberate investigation," Hamilton Watch

Co. v. Benrus Watch Co., 206 F. 2d 738, 740 (2nd Cir. 1953), and that "...the injury (to them) will be certain and irreparable if the application (for temporary injunctive relief) is denied and the final decree is in their favor, while if the injunction is granted, the injury to the Defendant parties even if the final decree is in their favor, will be inconsiderable..."

Plaintiffs will show that they have no plain, adequate or complete relief other than for this application for temporary injunctive relief. They will show that the deprivation of their rights cannot be fully compensated for by monetary damages.

Joseph P. Grancio

JOSEPH P. GRANCIO

Sworn to and subscribed before me
this day of September, 1972.

NOTARY PUBLIC

My Commission Expires: _____

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

CIVIL NO. _____

JOHN F. GANGEMI and JENNIE DI CARLO,

PLAINTIFFS

vs

SALVATORE SCLAFANI, HERBERT J. FEUER, ALICE SACHS, ELIZABETH A. CASSIDY, CHARLES AVARELLO, ANTHONY SADOWSKI, STANLEY C. KOCHMAN, JOSEPH PREVITE, ELRICH A. EASTMAN, in their official capacities as Members of the New York City Board of Elections, and the NEW YORK CITY BOARD OF ELECTIONS, A governmental entity,

DEFENDANTS

Plaintiffs' First Amendment as of Right

Pursuant to rule 15 of the federal rules of Civil Procedure, Plaintiffs hereby amend the complaint as follows:

1. The jurisdictional allegations of the complaint in main are hereby amended to include therein the 1965 Voting Rights Act as amended (42 U.S.C. §1973c) and the First Amendment to the United States Constitution.

2. The substantive allegations of the Complaint in main are hereby amended to include that:

a. The action complained of herein (the removal of the Plaintiffs' names from the ballot) infringes upon their right to unencumbered association as guaranteed to them under the first Amendment to the United States Constitution.

b. The New York State Court of Appeals, by its decision, has created a change in the New York State Election Law as it relates to the standards, practices and procedures relating to voting other than was in force on November 1, 1968.

c. The State of New York comes within the provisions of the Voting Rights Act of 1965 as amended (42 U.S.C. §1973c)

d. The provisions of the Voting Rights Act of 1965

as amended (42 U.S.C. §1973 c) were not complied with in view of the change created by the New York State Court of Appeals and in view of the prerequisites required by said act in order to validate such substantive change.

Respectfully submitted,

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IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

CIVIL NO. _____

JOHN F. GANGEMI and JENNIE DI CARLO,

PLAINTIFFS

vs

SALVATORE SCLAFANI, HERBERT J. FEUER, ALICE SACHS, ELIZABETH A. CASSIDY, CHARLES AVARELLO, ANTHONY SADOWSKI, STANLEY C. KOCHMAN, JOSEPH PREVITE, ELRICH A. EASTMAN, in their official capacities as Members of the New York City Board of Elections, and the NEW YORK CITY BOARD OF ELECTIONS, a governmental entity,

DEFENDANTS

Supplement to the Memorandum of Law

In view of the Amendment to the Complaint, relating to the Voting Rights Act, see:

1. United Ossining Party v. Hayduck 357 F.Supp. 962 (S.D.N.Y. 1971)

a. The Supreme Court recently held that where §5 is invoked our function is limited to determined whether the challenged law is subject to the provisions of that Act and that if we so conclude the enactment cannot become operative until it has first been approved by one of the two alternative procedures prescribed by §5, regardless of whether we believe that the challenged provision does not discriminate on basis of race or color.

2. Perkins V. Matthews, 400 U.S. 379, 91 S.Ct. 431, 27 L.Ed. 2d 476 (1971)

3. Allen V. State Board of Elections, 393 U.S. 544, 89 S. Ct. 817, 22 L. Ed. 2d1 (1969)

b. "That &5 must be given the "broadest possible scope" to reach"any state enactment which altered the election law of a covered State in even a minor way."

Respectfully submitted

45

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State of New York
Court of Appeals

2 No. 420 74

In the Matter of Edward R. Lutfy, et al.,

Appellants,

vs.

John F. Cangemi, et al.,

Respondents,

and Salvatore Sclafani, et al., constituting the Bd. of Elections in the City of New York,

Respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

PER CURIAM:

The order of the Appellate Division should be reversed, the order dismissing the proceeding vacated, and the relief requested by petitioners granted.

It was definitively decided in Matter of Burns v. Wiltse (303 N.Y. 319) that one may not run for a public office in which one would not be eligible to serve because of a prior pending candidacy for an incompatible position. Similarly, in Matter of Ryan v. Murray (172 Misc. 105, affd. 257 App. Div. 1068) and in Matter of Trongone v. O'Rourke, 68 Misc. 2d 6, affd. 37 A D 2d 763), in circumstances precisely like those in this case, it was held illegal to run for more than one party office where incompatibility forbade holding more than one such office. In each of these cases, however, it was also held that the petitioner could stand as a candidate for at least one office if the other incompatible candidacies, which rendered the designating petitions invalid, were eliminated by "declination" or action of the Board of Elections. Since this multiplicity of inconsistent candidacies has been properly recognized as injurious to the rights of the

electorate, and described as fraudulent and deceptive, and because here the multiplicity of inconsistent candidacies for the county committee was intentional, the dissenters at the Appellate Division were correct in concluding that respondents' designating petitions should fail entirely.

With this practice, and absent acceptable excuse or justification, the voters who signed the offending petitions must be assumed to have been misled as to the candidates' intentions to serve as their representatives if designated and subsequently elected at the primary. Moreover, the petitions were misleading in suggesting that the various candidates listed intended to run together. These irregularities were also harmful because those who signed were precluded by law from signing petitions for other candidates for the same office (Election Law, § 136, subd. 8). Thus, the petitions must be considered to have been permeated with the defect intentionally introduced into them by the circulators and those candidates who participated in the circulation. As a consequence, this court agrees with the dissenters at the Appellate Division in this case that so much of the holdings in the Ryan and Trongone cases as permitted a single candidacy to survive are not to be followed.

Accordingly, the order of the Appellate Division should be reversed, without costs, and the petition under section 330 of the Election Law granted.

* * * * * *

Order reversed, without costs, and the petition under section 330 of the Election Law granted. Opinion Per Curiam. Concur: Dreitel, Chief Judge, Gabrielli, Jones, Wachtler, Rabin and Staley, JJ.

1677 E

In the Matter of
Edward R. Lutfy et al., petitioners
v. John F. Gangemi, etc., John F. Gangemi et al., etc., and Barbara L. Gangemi, et al., constituting the Committee to Fill Vacancies, Salvatore Sclafani et al., members of and constituting the Board of Elections in the City of New York, respondents.

Judgment of the Supreme Court, Kings County, dated August 13, 1974, affirmed on the opinion of the Special Term, without costs.

GULOTTA, P.J., LATHAM and MUNDER, JJ., concur.

SHAPIRO and BENJAMIN, JJ., dissent and vote to reverse and to declare the petitions for County Committeeman and for State Committeeman invalid, for the following reasons:

In our opinion, the attempt by respondent Gangemi to run in all 25 election districts as County Committeeman when he knew he could only serve as an elected County Committeeman from one district was tantamount to a fraud on the electorate. Such a practice should not be encouraged. Under the circumstances, we feel that the petition designating Gangemi for County Committeeman in each of the districts, as well as his designation as State Committeeman, is invalid. We agree with the statement of the court in Matter of Ryan v. Murray (172 Misc. 105, affd. 257 App. Div. 1068) deploring such practice, but we do not agree with its conclusion that the offender should be prepared to run in one district of his subsequent choice. Furthermore, we do not agree with the determination in Matter of Trongone v. O'Rourke (68 Misc 2d 6, affd. 37 A D 2d 763) that, despite the practice of a deception and fraud on the enrolled voters of the party, the candidate should receive the benefit of being permitted to run in one election district.

EXHIBIT "C"

THE COURT: In this proceeding, brought pursuant to Section 330 (1) of the Election Law, Petitioners seek an order prohibiting the Board of Elections from placing the names of respondents, John F. Gangemi, and Jennie Di Carlo on the ballot for the offices of Male and Female Members of the Republican State Committee from the 49th Assembly District, respectively, at the primary election to be held on September 10, 1974.

Concededly, the petition filed by Respondents, contains sufficient signatures to validate their respective candidacies. However, on the same petition sheet circulated for the positions here involved, were a list of candidates for the position of County Committeemen from the various Election Districts within the 49th Assembly District. Mr. Gangemi's name is listed as a candidate for County Committeeman from 25 separate Election Districts. Mrs. Di Carlo was listed as a candidate in three separate Election Districts.

Various other persons closely connected to them were also listed in more than one District. The Board of Elections invalidated these candidacies for all but one Election District per person.

It is Petitioner's contention that the circulation of the subject petition in this matter constitutes fraud upon the electorate, to such an extent as would warrant the invalidation of the entire petition on the grounds that it is permeated with fraud.

While there is no statutory authority which prohibits an individual from running for County Committeeman from two or more Election Districts at the same time, the Courts have prohibited such practice

In Ryan versus Murray (172 Misc 105,AFSD 257 APP. DIV 1068), the Court stated that a person can "only serve as a County Committeeman for one specific District. He would be entitled to cast only one vote as a member of the County Committee." See 172 Misc. Page 107.

The Court further held, that to permit a person to remain on the ballot in all of the Election District would consitute a fraud and deception practiced upon the enrolled voters of the party. See also Burns against Wiltse 303 NY 319. However, the Court did permit the candidate there involved, to remain as a candidate in one Election District, as the Board of Elections did in the instant case.

While in Ryan (Supra) the moving parties did

not seek invalidation of the entire petition, the Supreme Court New York County applied that case to a proceeding in which such relief was sought in Trongone against O'Rourke 58 Misc 2d 6. In that proceeding, the candidate filed petitions for District Leader from two separate units of representation. After filing, he declined in one District, and another person was substituted. His opponent sought to have both candidacies declared invalid on the grounds of fraud.

The Court in Special Term, noted that the problem of one candidate running for two inconsistent offices has been resolved by his declination from one of them. It further noted, as this Court does, that in the Ryan case, the candidate was permitted to run in one Election District. The Court then stated that "Even if it is considered that the method indulged in by the Respondent was an artifice or device, which could be construed as deception or fraud of the enrolled voters of the party, he should have the right to present his candidacy to the electorate." 68 Misc. 2d at page 8. That decision was affirmed by the Appellate Division, First Department, without opinion at 37 AD 2d 763.

The effect of the decision in the Trongone case

(Supra) is that while one may not run for two incompatible offices and while to do so is a deception which constitutes fraud, once the conflict of the offices is resolved, either by declination, or by striking the candidacy as in the Ryan case (Supra), the candidate should be permitted to run for the remaining office.

In view of the foregoing, it is the opinion of this Court that the petition here involved is not "so permeated with fraud," as a result of the various candidacies of County Committeemen and Women, as to warrant its invalidation.

Accordingly, the application is denied and the proceeding is dismissed.

Settle order on Notice.

MR. BONINA: Thank you, your Honor.

. . . . . .

DESIGNATING PETITION—REPUBLICAN PARTY

KINGS COUNTY

To the Board of Elections in the City of New York:

I, the undersigned, do hereby state that I am a duly enrolled voter of the Republican Party, that my place of residence is truly stated opposite my signature hereto, and I do hereby designate and I intend to support the following named person (or persons) as a candidate (or candidates) for the nomination of such party for public office (or offices) or for election to a party position (or positions) of such party, to be voted for at the primary election to be held on the 10th day of September, 1974.

NAME(S) OF CANDIDATE(S)	PARTY POSITION(S)	PLACE(S) OF RESIDENCE
JOHN F. GANGEMI	Male Member of the Republican State Committee from the 49th Assembly District of the State of New York	1358 85th Street Brroklyn, N.Y. 11228
JENNIE DiCARLO	Female Member of the Republican State Committee from the 49th Assembly District of the State of New York	1170 85th Street Brooklyn, N.Y. 11228
	Members of the Republican County Committee of the County of Kings 49th Assembly District of the State of New York .....Election District	(Zip) (Zip) (Zip) (Zip) Brooklyn, N.Y.

I do hereby appoint:

BARBARA L. GANGEMI, residing at 1358 85th Street, Brooklyn, N.Y. 11228
CONSTANCE DiGIOVANNA, residing at 1357 83rd Street, Brooklyn, N.Y. 11228
MICHAEL DiCARLO, residing at 1170 85th Street, Brooklyn, N.Y. 11228
JUNE A. GRANCIO, residing at 128 Marine Avenue, Brooklyn, N.Y. 11209
JOSEPH P. GRANCIO, residing at 128 Marine Avenue, Brooklyn, N.Y. 11209

all of whom are enrolled voters of the Republican Party, as a Committee to fill vacancies in accordance with the provisions

of the election law.

IN WITNESS WHEREOF, I have hereunto set my hand the day and year placed opposite my signature.

DATE	FULL NAME OF SIGNER	RESIDENCE	State of New York	
			Election District	Assembly District
1. 1974		City of New York – Kings County		
2. 1974		City of New York – Kings County		
3. 1974		City of New York – Kings County		
4. 1974		City of New York – Kings County		
5. 1974		City of New York – Kings County		
6. 1974		City of New York – Kings County		
7. 1974		City of New York – Kings County		
8. 1974		City of New York – Kings County		
9. 1974		City of New York – Kings County		
10. 1974		City of New York – Kings County		
11. 1974		City of New York – Kings County		
12. 1974		City of New York – Kings County		
13. 1974		City of New York – Kings County		
14. 1974		City of New York – Kings County		
15. 1974		City of New York – Kings County		

STATEMENT OF WITNESS

I, ... (Name of Witness), state: I am a duly qualified voter of the State of New York and am an enrolled voter of the Republican Party. I now reside at ..... (Fill In Street and House Number) which is in the ..... (Fill In Number) election district of the ..... (Fill In Number) Assembly District in the City of New York, in the County of Kings. I was last registered for the general election in the year 1973 from ..... (Fill In Street and House Number) in the County of Kings. The said residence was then in the ..... (Fill In Number) Assembly District in the City of New York. Each of the individuals whose names are subscribed to this petition sheet containing ..... (Fill In Number) signatures subscribed the same in my presence and identified himself to be the individual who signed this sheet.

I understand that this statement will be accepted for all purposes as the equivalent of an affidavit and, if it contains a material false statement, shall subject me to the same penalties as if I had been duly sworn.

Date ....., 1974 .....
(Signature of Witness)

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